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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

In the Matter of Pittsburgh Railways Company, Debtor.

NO. 361.

PHILADELPHIA COMPANY, Petitioner,
v.
HORACE F. BAKER and JOHN A. BEATTIE, Protective Committee for Southern Traction Company 50-Year First Mortgage and Collateral Trust 5% Gold Bonds.

NO. 364.

MONONGAHELA STREET RAILWAY COMPANY and PITTSBURGH AND BIRMINGHAM TRACTION COMPANY, Petitioners,
v.
HORACE F. BAKER and JOHN A. BEATTIE, Protective Committee, etc.

On Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS.

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On Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR HORACE F. BAKER AND JOHN A. BEATTIE, PROTECTIVE COMMITTEE FOR HOLDERS OF BONDS OF SOUTHERN TRACTION COMPANY.

OPINIONS BELOW.

The opinion of the District Court (R. 133 a) is reported in 60 F. Supp. 600. The opinion of the Circuit Court of Appeals for the Third Circuit (R. 939) is reported in 155 F. (2d) 477.

JURISDICTION.

The orders of the Circuit Court of Appeals were entered on May 7, 1946 (R. 952-954). A petition for clarification of the opinion and orders was denied without opinion on June 28, 1946 (R. 970). A petition for writ of certiorari was filed on August 5, 1946.

The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

Respondents adopt the statement of the questions presented as it appears in the brief of the City of Pittsburgh filed at No. 361.

STATEMENT.

Respondents adopt the statement of the case as it appears in the brief of the City of Pittsburgh, but add certain facts applicable to this petition.

On July 24, 1941, Horace F. Baker and John A. Beattie were appointed a Protective Committee for Southern Traction Company 50-year First Mortgage and Collateral Trust 5% Gold Bonds of the Southern Traction Company. These bonds were issued under an indenture, dated October 1, 1900, of the Southern Traction Company (the corporate title of which was later changed to Pittsburgh Railways Company). A total of $4,000,000 of bonds are outstanding under this indenture, and of this

amount $1,338,000 in par value, or 33.5% are owned by the Philadelphia Company (City Ex. 8; SMR, Par. 46-1).

The mortgage securing these bonds is a lien upon "all the property, real, personal and mixed, now owned, or hereafter acquired, together with all the rights, privileges and franchises which it now owns or may hereafter acquire". (SMR, Par. 60).

Since 1902 Philadelphia Company has owned all of the common and preferred stocks of the Southern Traction Company, later the Pittsburgh Railways Company (SMR, Par. 18).

Pittsburgh Railways Company owns all of the common stock of the United Traction Company of Pittsburgh, and of 25 other underlying street railway or traction companies (SMR, P. 42).

As stated on Page 11 of the petition of the Philadelphia Company "Since 1902 all of the property of Pittsburgh Railways Company and the underlier companies has been operated by Pittsburgh Railways Company as a unified street railway system, pursuant to the leases and operating agreements above referred to (R. 667, SMR 211 *et seq.*)."

ARGUMENT.

I.

THE PHILADELPHIA COMPANY, WITH THE CONSENT AND COOPERATION OF THE UNDERLIERS, HAS EFFECTED A MERGER IN FACT OF THE UNDERLYING COMPANIES WHICH FORM THE PRESENT SYSTEM.

The record establishes the following facts:

1. ROLLING STOCK. The rolling stock owned by the Southern Traction Company, now Pittsburgh Railways Company, and by the underliers when the Philadelphia Company acquired control in 1902 has been worn out or disposed of without setting up any fund for its replacement. There has been substituted other rolling stock purchased out of the fares which under the terms of the leases Pittsburgh Railways Company was entitled to receive from the operation of the system as a whole. The rolling stock which was security for the payment of the bonds of the Southern Traction and the underliers has completely disappeared.

The Master found that on January 1, 1902 Pittsburgh Railways and 16 underliers had approximately 1,200 passenger cars and 119 miscellaneous cars, and of these, only 32 service cars now remain (SMR, Pars. 514, 631). The usual life of passenger cars is about 20 years (SMR, Par. 632).

In the Pittsburgh Railways system there are now 1,053 passenger cars of which 401 are of the new improved type known as PCC cars, acquired in 1936 or later (SMR, Par. 635). No cars are allocated to any underlier.

2. CAR BARNS. Twenty car houses which existed in 1902, have been razed or sold (SMR, Par. 513). Three were in the Pittsburgh system, 12 in the United system and 5 in the Consolidated system (SMR, Par. 571). At present there are 14 car houses in use and 3 not in operation. Two of these are used to house cars without regard to the lines of separate underliers. If the entire railway system were split into three segments—, Pittsburgh, United and Consolidated—as suggested by the Philadelphia Company, each of the three systems would not have car barns available. For example of 32 car routes composing the former United system, 11 are served by car houses belonging to lessors of United, 5 by car houses owned by Consolidated or its lessors and 16 by car houses owned by Pittsburgh (SMR, Pars. 572-575).

3. CAR SHOPS. Prior to 1926 there were four active car shops in operation, one on land owned by Pittsburgh Railways, one on land owned by lessee of United Traction and two on land owned by Consolidated Traction. Two of these shops have been disposed of and the others abandoned. All of the shop equipment has been concentrated, and all of the shop work is now conducted at the Homewood Shop (SMR, Par. 652).

4. POWER PLANTS. At least eight power generating stations which existed in 1902 and were owned by underliers have been disposed of and neither Pittsburgh Railways nor any underlier has any power generating system. Of the former 8 generating stations, three were discontinued about 1904 and five were sold to Duquesne Light Company in 1913 (SMR, Par. 512). In lieu of these power stations a contract was entered into in 1913 between Pittsburgh Railways Company and Duquesne

Light Company, both of whose stock is owned by Philadelphia Company, providing that Duquesne should furnish all power for the purposes of Railways for a period of 50 years (SMR, Par. 528). By this means Philadelphia Company diverted a large revenue from the underliers and transferred it in effect to itself. Pittsburgh Railways today has no facilities for generating power to operate its cars (SMR, Pars. 522-525).

5. RAILS, SWITCHES, ETC. The rails, switches and other track equipment, poles, transmission lines and wires of Pittsburgh Railways and the underliers have been allowed to wear out without any fund for their replacement and for them has been substituted other equipment purchased out of the general funds of the Pittsburgh Railways Company so that the rails, switches, track equipment, poles, transmission lines and wires which were owned by Pittsburgh Railways and the underliers and were security for their bonds have completely disappeared.

6. CAR ROUTES. Car routes and schedules have been arranged without taking into account the limits of the original system of the Pittsburgh Railways or any underlier so that Pittsburgh Railways and the underliers have no separate business. There are a total of 82 routes which use the franchises of 44 companies. Of the 82 existing routes, 53 operate in continuous service over the lines of 4 or more different underliers. 5 routes operate over lines of 10 underliers, 3 over 12 and 1 over 13 (SMR, Par. 712). One route operates lines franchised to 10 companies, making 30 changes from the lines of one to those of another in the course of a round trip (SMR, Par. 723).

7. FARES. No separate fares are collected for the use of the Pittsburgh Railways system or any underlier, and no separate account of the earnings is kept. For many years the receipts from the lines franchised to all of the companies have been mingled in a common treasury, so that it is impossible to determine the receipts of any underlier or its share in the common fund.

8. DISBURSEMENTS. Fares collected from the entire system and other income have been used indiscriminately to meet interest charges, rentals and other obligations of the multitude of corporations included in the system.

9. REPAIRS. Philadelphia Company has imposed upon Pittsburgh Railways by leases and operating agreements, the obligation to keep in repair and furnish with equipment the numerous other lines belonging to companies whose stocks are owned directly or indirectly by Philadelphia Company.

10. FRANCHISES. The franchises of Pittsburgh Railways and the underliers have been interwoven in the operation of the system as a whole, with the result that these franchises have been deprived of any separate business and their value greatly diminished.

11. MANAGEMENT. The operation and management of Pittsburgh Railways and the underliers have been conducted by a common staff of officials, many of whom are also employees of the Philadelphia Company, so that neither the Pittsburgh Railways nor any underlying company has any separate organization or administrative staff.

To summarize, the separate underliers have no power plants or means of generating current, no car shops, no car barns and no rolling stock and no separate staff for management or operation. Rails, switches, poles and transmission lines have been allowed to wear out and for them has been substituted other equipment purchased out of the general funds of the Pittsburgh Railways Company. In general, this equipment is heavier and more expensive than that which it replaced, although the leases from underliers commonly required the Pittsburgh Railways Company as lessor to deliver upon termination of the lease only "like or similar personal property of value equal to the amount of said inventory" which was to be made at the beginning of the lease (See Monongahela Street Railway Company lease, Ex. 3, Document 6).

From the foregoing facts, it appears that the Philadelphia Company, with the active cooperation and consent of the underliers, has effected a merger in fact of the assets of the Pittsburgh Railways Company and the underlying companies, as complete as if a merger in law of the respective corporations had been carried through. The effect has been to deprive the holders of bonds of the Pittsburgh Railways Company and other underlying companies of virtually all of the security which the bonds had when they were issued. Substantially no security remains except a few odd pieces of real estate and franchises which are so enmeshed with franchises of other underliers that an underlier has no separate business and its franchise has no value except as a link in a larger system.

Because the separate property of the underlier no longer exists, the value of its bonds depends almost

entirely upon the operation of the railway system as a whole. If the system is broken up by foreclosures, the recovery of a bondholder of an underlier will amount to little.

As this court said in *Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S. 648, 671 (1935):

> "* * * A railway is a unit; it cannot be divided up and disposed of piecemeal like a stock of goods. * * *"

II.

THE FEDERAL COURTS HAVE DISREGARDED THE SEPARATE ENTITY OF A CORPORATION WHENEVER NECESSARY TO ACCOMPLISH THE PURPOSE OF AN ACT OF CONGRESS.

In no other jurisdiction is there such a large body of decisions disregarding the legal entity of a corporation, as is found in the decisions of the federal courts. The reason is to be found in the paramount purpose of these courts not to permit the existence of a technical corporation to defeat the application of an Act of Congress.

For example, such decisions have been found necessary in order to give effect to the Sherman Anti-trust Law, the commodities clause and the prohibition against discrimination in the Interstate Commerce Act, the income tax laws and the Bankruptcy Act.

This principle is frequently applied where as in this case, the assets and business of two or more corporations have been commingled and managed as a single unit. Our research, however, has found no case in which the separate units have been so thoroughly oblit-

erated or the merger so completely effected as in the case of the Pittsburgh Railways.

In *Southern Pacific Terminal Company v. Interstate Commerce Commission,* 219 U. S. 498 (1911), the Terminal Company, though not a common carrier, was ordered not to discriminate in wharfage charges.

This court said:

> "* * * * The control and operation of the Southern Pacific Company of the railroads and the Terminal Company have united them into a system, of which all are necessary parts, the Terminal Company as well as the railroad companies. * * * (521)
>
> "* * * And it is with the system that the law must deal, not with its elements. Such elements may, indeed, be regarded from some standpoints as legal entities; may have, in a sense, separate corporate operation; but they are directed by the same paramount and combining power and made single by it. In all transactions it is treated as single." (523-524)

Again in *Southern Pacific Co. v. Lowe,* 247 U. S. 330 (1918), this court found occasion to ignore the separate corporations of the Southern Pacific system, saying:

> "* * * While the two companies were separate legal entities, yet in fact, and for all practical purposes they were merged, the former being but a part of the latter, acting merely as its agent and subject in all things to its proper direction and control. * * *" (337-338)

It is true that the stock of some of the subsidiary corporations is owned, not by the Pittsburgh Railways

Company, but by the Philadelphia Company which holds the stock of the Pittsburgh Railways. In *United States v. Reading Company et al.,* 253 U. S. 26, the stocks of the railroad company and of the coal company were owned by a common parent corporation.

Petitioners argue the underlying corporations were legally created under the laws of Pennsylvania. This was true generally in this line of decisions. In fact, if the corporation were not legally chartered, there would be no corporate entity to disregard.

The outstanding decision in *Northern Securities Company v. United States,* 193 U. S. 197, has points of similarity. There this court said:

> "* * * Not even a State, still less one of its artificial creatures, can stand in the way of its enforcement. (333) * * * Every corporation created by the State is necessarily subject to the supreme law of the land. * * *" (346)

Recently, in *Anderson v. Abbott,* 321 U. S. 349, this court said:

> "* * * It has often been held that the interposition of a corporation will not be allowed to defeat a legislative policy, whether, that was the aim or only the result of the arrangement. (362-363) * * * The policy underlying a federal statute may not be defeated by such an assertion of state power." (365)

In this case at bar the facts present a problem of reorganization which clearly falls within the scope and purpose of the Chandler Act. The ruling purpose in the reorganization of a railroad or public service company is to reorganize the properties and assets which have been

devoted to public use into a new agency which will be able to continue to serve the public. The corporations have been merely the legal custodians. Here especially the court must look at realities, not fictions. Unless the court may disregard the separate existence of the underlying corporations, no effective reorganization of the street railway system of the Pittsburgh district as a whole is possible.

III.

PHILADELPHIA COMPANY AND THE UNDERLIERS HAVE ESTOPPED THEMSELVES FROM OBJECTING TO A SYSTEMWIDE REORGANIZATION WHICH WILL INCLUDE ASSETS OF THE UNDERLIERS WHICH ARE INTERMINGLED WITH THE ASSETS OF THE PITTSBURGH RAILWAYS COMPANY.

Before the Philadelphia Company got control of Southern Traction and the underliers, each of these was a complete railway system, controlling its own fares and paying interest on bonds and operating expenses. Each had a complete railway system which was security for the bonds which the underlier had issued.

In 1902 Philadelphia Company and the underliers by corporate proceedings, approved by stockholders and directors, joined in combining Pittsburgh Railways and the underliers into a single street railway system. They executed leases and operating agreements which made it possible for Pittsburgh Railways to operate their respective properties as a unit. What had been before a number of separate units became a single system. Philadelphia Company and the underliers sanctioned this; and permitted the properties of the separate companies to be welded into a single unit; the separate equipment of each underlier to be used interchangeably on the whole system, to be worn out and disposed of without

being replaced; the fares collected on the respective routes to be paid into a common treasury for the whole system without any attempt to ascertain how much was earned by each underlier, and this common fund of receipts to be expended in the payment of interest charges, operating expenses and many other items for any unit of the system and without reference to how much any particular company contributed to the common fund.

For 44 years the Philadelphia Company and its underliers have permitted this gradual amalgamation of the system and the mingling of assets and cash fares to be carried on without objection on their part. They have permitted books to be kept and financial statements to be issued for the system as a whole and not for any separate underlier.

The members of the general public have adjusted themselves to the operation of the system as a whole, have located residential districts, shopping areas and great industries and arranged their affairs so as to take advantage of a single system which enables them to reach every point in a large community. Their patronage has supported and built up this integral system of transportation. Philadelphia Company and the underliers may not now take back their properties and break up this unified system. A Bankruptcy Court is charged with the duty of administering principles of equity and may not release them from their duty to serve the public with adequate facilities.

In view of these circumstances, we submit, Philadelphia Company and the underliers are now estopped to object to a plan of reorganization which will include the assets of the underliers which were part of the system.

Again as a result of the acts of the Philadelphia Company and the underliers the public use to which these separate street railway companies were devoted, has been changed. The separate public use of each underlier has been abandoned. The underliers are now devoted as a whole to public use. This combined public use as a system has been recognized by the Public Service Commision of Pennsylvania.

In a former proceeding, *City of Pittsburgh v. Pittsburgh Railways Company,* 8 Pa. Corp. Rep. 441 (1920) before the Public Service Commission of Pennsylvania, the commission said of the Pittsburgh Railways Company:

> "Disintegration of the system into its component parts, and these separately operated, presents a threatening situation so detrimental and dangerous to the public interests of Pittsburgh that every reasonable effort ought to be put forth to avoid it." (446)

The Philadelphia Company and their underliers have devoted their respective properties owned or controlled by them to a combined or unitary public use, and they cannot now withdraw them from such use or abandon such use.

The public use to which underliers is today devoted, is not a separate public use but a common systemwide public use. For 44 years a separate underlier has wholly abandoned the separate function or use and has allowed the property and equipment essential to the exercise of its public franchises to be made a part of the unitary system and to be used therein until worn out or otherwise disposed of, and to be replaced by other property and equipment purchased from earnings of a sys-

tem as a whole. The underlier has disabled itself from performing its public function as a separate street railway. The underlier has permitted its franchises to become inextricably involved in a mass of other franchises employed in carrying out a unitary system of street railway transportation.

Philadelphia Company and the underliers are now estopped from breaking up this common system and destroying the greater public use to which their franchises have been devoted and attempting to resume a separate public use which has not existed for 44 years.

Respectfully submitted,

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